Supreme Court U.S.
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No. 2006_____

In THE
SUPREME COURT of the UNITED STATES
October Term 2006
Appeal from the Montana Supreme Court

Joseph F. Nascimento,
Petitioner,

v.

Montana Supreme Court, et al
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Kevin E. Vainio, Esq.
Attorney for Petitioner
27 West Park Street
Butte, MT 59701
(406) 782-3357

QUESTIONS PRESENTED FOR REVIEW

1. To what extend if any, does an attorney lose their Constitutional Rights as a result of being an attorney to exercise his or her rights guaranteed under the United States Constitution. To what extent can an attorney's be denied their **First Amendment** Rights to speak of and, report public corruption; Bribery and; Other case fixing activities between a judge and; Unscrupulous attorneys? As a victim of criminal case fixing activities can attorneys be, denied the rights guaranteed by the **First Amendment** to report public corruption and petition for redress of grievances?

2. To what extent can attorneys **Fifth Amendment** right to ~~a speedy~~ trial and speedy review of their law license suspension be denied? To what extent can an attorneys **Fourteenth Amendment** rights denying due process be violated in suspending an attorneys license to practice law? To what extent can an attorney residing out of states Constitutional rights guaranteed under the Privileges and Immunities Clause Art. IV. 2 be violated?

3. To what extent can a judge and ethics commissioners be denied immunity from suit for acts of malfeasance. Is a judge fixing cases with attorney and accomplices on the states ethics commission immune from suit?

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Parties: Karla M. Gray, Patricia Cotter, John Warner, W. William Leaphart, Brian Morris, Jim Rice, James C. Nelson

Petition For A Writ Of Certiorari

OPINIONS ATTACHED

Comes now the Petitioner thru his attorney to allege as follows:

The Montana Supreme Court final opinion and Order concerning Petitioner' law license suspension dated September 27, 2006 ending Petitioners state review. Also see the January 21, 2004 opinion. Contained in the attached Appendix.

JURISDICTION OF THE SUPREME COURT

The final judgment was entered and filed on September 27, 2006. This court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1257, because raised and preserver, and the highest court of the state specifically rejected, a constitutional claim. The case has been under review since January 21, 2004. **The September 27, 2006 Order is the final disposition of this matter**.

The Montana Supreme Court hereafter referred to as "MTSCT". The decision to indefinitely suspend Petitioner's law license was originally entered on January 21, 2004. The "MTSCT" rejected Petitioner's federal constitutional claims which were never addressed. Petitioner filed motion for reconsideration which was granted on, July 01, 2004. Petitioner's law license has been in limbo since July 01, 2004. Petitioners case was referred to a five judge Montana state district court panel to review the Commission on Practice hereafter "Commission" actions. The Commission unconstitutionally framed; Petitioner. The five judge state panel assigned the case on July 01, 2004 has

refused to consider evidence or grant Petitioner a hearing or, any relief. **The Montana Supreme Court has also, admitted violating Petitioners constitutional rights.** Petitioners case has never been listed in any case reporter.

CONSTITUTIONAL AT ISSUES - In pertinent part

AMENDMENT I- "Congress shall...or abridging the freedom of speech...or the right of the people. ..to petition the government for a redress of grievances".

AMENDMENT V- "No person shall be....deprived of life, liberty, or property, without due process of law; ....".

AMENDMENT VI - "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial...by an impartial jury. and....to have witnesses in his favor...".

AMENDMENT XIV - " ....No state shall ... abridge the privileges and or immunities of citizens ....; nor shall any state deprive any person of life, liberty, or property without due process of law."

PRIVILEGES and IMMUNITIES CLAUSE of ARTICLE 2 of the U.S. CONSTITUTION - "The citizens of each state shall be entitled to all privileges and immunities of citizens ..... states."

In pertinent part, Montana Rules of professional conduct state:

Rule 8.2 (a), making false or reckless statements concerning the integrity of a judge.

Rule 3.3(a)(4), offering evidence that the lawyer knows to be false.

Rule 8.4(d), engaging in conduct that is prejudicial to the administration of justice.

Petitioner is has not violated the above rules. In fact the Petitioner has shown the highest decree of honesty, ethics and courage to truthfully report the case fixing occurring within the Montana legal system.

The above rules are vague, overboard misapplied. Truth is a total defense. Petitioner's statements are true. Although the Montana Supreme Court has publicly **admitted there was actual prejudice and unfairness in the unconstitutional suspension of Petitioner's law license** it affirmed their and the five judge panels rulings, assessing costs and ending the state appeal process on September 27, 2006. The "MTSCT" expressly rejected the constitutional challenges presented here.

STATEMENT OF FACTS

Petitioner is a former business and constitutional law and ethics professor, with a B.S. in Business, M.B.A., and J.D. in law. Petitioner has been an attorney for twenty three years. Petitioner has been a licensed Montana attorney in good standing since 1983. Petitioner has been admitted and was in good standing in the Ninth Circuit Court since 1983.

Petitioner was married for twelve years and **dissolution of marriage was granted in 1993.** There was one child of the marriage a daughter born on 09/18/85. Daughter was generally split 60% with Petitioner and 40% with former spouse; While Petitioner

resided in Montana. Petitioner paid one half the costs of raising daughter. Petitioner moved from Montana in July 1998. Petitioner left daughter with former spouse for six months after leaving Montana. Petitioner continued paying the costs of raising daughter, while daughter remained in Montana.

In January 1999 former spouse sent daughter to permanently reside with Petitioner. Petitioner and daughter have been residing in Las Vegas, NV since 1999. Petitioner's former spouse remarried and stated she had a new family and "did not want daughter anymore." Petitioner sent daughter to Montana to visit former spouse in 1999. During this 1999 visit daughter was abused threatened with beatings and ; To be tied up with phone cords. Daughter was sent back to Petitioner.

Since 1999 daughter has refused to see her mother due to abuse. Former spouse admitted to abusing daughter during the 1999 visit. Montana state district judge McCarter was made aware of the abuse on numerous occasions.

Petitioner requested child support and a parenting plan. Former spouses' original attorney advised her (former spouse) she was required by law to pay child support. Former spouse promptly fired her initial divorce attorney.

In early September 1999 former spouse informed Petitioner that she had a new attorney who was hired because she (new attorney Weber) had **allegedly bribed**

judge McCarter on prior occasions and would ensure Petitioner's child support case would never be heard. Petitioner promptly called (new attorney) attorney Robyn Weber. Weber refused to speak with Petitioner. Petitioner left a detailed message explaining the need to talk and reach a parenting plan and begin receiving child support. Weber never returned a call from Petitioner for the two and a half years that (Weber) was former spouse's attorney.

In stead of returning Petitioner's phone call former spouse and her attorney filed false affidavits claiming daughter was kidnapped in the court of Montana state judge McCarter. The false affidavit claimed that neither former spouse nor Weber knew how to contact the Petitioner and daughter. Judge McCarter issued an ex parte temporary restraining order hereafter "**TRO**"; and, allowed, this fraudulently obtained ex parte "**TRO**" to remain in effect for approximately two and a half years.

On the same day after fraudulently obtaining the "**TRO**" former spouse on advice of counsel filed false police reports claiming daughter was kidnapped. The police reports contained three working phone numbers to reach Petitioner and daughter.

Former spouse visited Petitioner in Nevada and also called to brag and complained about the high cost of **bribing** judge McCarter. Former spouse alleged that judge McCarter had been accepting bribes/kick backs of attorney fees from the Weber Law Firm to **fix cases and misapply the law**. In exchange for cash payments judge Dorothy McCarter would ensure that Petitioner's civil

case would never be heard and that (judge McCarter) would not issue an order for child support. Judge McCarter refused to issue an order of child support and falsified court records to prevent the case from proceeding in a normal legal manor. In fact the Petitioner's case requesting a parenting plan and child support was never heard.

The "**TRO**" prohibited daughter from living with Petitioner. Former spouse visited daughter and Petitioner and left daughter with Petitioner. Former spouse stated "keep her I don't want her " (daughter). Petitioner informed judge McCarter of these facts. Daughter having no where else to reside continued to reside with the Petitioner.

Petitioner alleges judge Dorothy McCarter fixed Petitioner's state civil case by **devising an illegal scheme to falsifying court records,** falsifying the docket sheets, tampering with court documents and destroy or causing the destruction of Petitioners pleadings. These alleged, acts that meet the definition of public corruption, bribery and malfeasance.

Petitioner sent numerous motions seeking relief from McCarter's court. McCarter refused to act. Copies of police reports showing that the affidavits used by former spouse and her attorney were false were filed and sent to McCarter. Specifically that the police reports listed three working phone numbers to contact both Petitioner and daughter. The police reports even listed daughter's cell phone number. Judge McCarter was informed that the

"TRO" application claimed that former spouse and attorney Weber did not know how to contact Petitioner or daughter was a **fraudulently obtained**.

Petitioner attempted to appeal to the "MTSCT" on three separate occasions. Petitioner could not perfect his appeals because; Notices were withheld until appeal time periods had passed; the docket sheet was being falsified and court order(s) withheld and backdated.

On Petitioner's **first appeal**, the **"MTSCT" was informed** of what was occurring but; Stated they (MTSCT)lacked jurisdiction to intervene.

On Petitioner's **second appeal** the "MTSCT" informed Petitioner that any ethics issues should be filed with the "Commission" Petitioner followed the advice of the "MTSCT" and filed a confidential ethics complaint against opposing counsel attorney Weber. Former spouse informed Petitioner and daughter that judge McCarter would be fixing the ethics complaint for opposing counsel attorney Weber. Shortly thereafter the "Commission" stated they had no jurisdiction over Montana attorney Weber. The "Commission" has jurisdiction over all Montana attorneys. Over the years Petitioner left phone messages, daughter sent letters and filed motions for relief. Petitioner even filed a subpoena request that was filed into the court records and was then stolen; Court were records intentionally falsified and no subpoena was ever issued to the Petitioner.

Judge McCarter was asked to order mandatory phone conferences between the parties or assign a mediator to

force opposing counsel to speak with Petitioner. State judge McCarter did nothing but falsify the docket sheet, and took actions leading to destroying court records. Notice were withheld so no timely appeals or; disqualifications could be filed. Judge McCarter issued no orders informing Petitioner of her (McCarter's) actions.

For the Court's information Montana judge McCarter has misused her office before violating individual's rights in issuing "TRO's". McCarter's misuse of the "TRO" which was overturned by another state judge, after the party filed an appeal. By, falsifying the docket sheet, withholding notices and backdating court orders **the alleged corruption** and case fixing activities involving McCarter **cannot be reviewed**. Thereby eliminating any possible appeals of judge McCarter's actions. Judge McCarter finally **ordered the parties to file a report to the court**.

Petitioner's pleadings and documents were disappearing and not reflected in the docket sheet. Petitioner **sent three** identical original reports to the court, to ensure it (the report to the court) would be filed. Judge McCarter was left a message by Petitioner, stating the reports to the court would be arriving and needed to be filed. **One** report to the court was faxed to the clerk of the state district court. **One** report to the court was sent U.S. mail to the clerk of the state district court. **One** report to the court was sent by federal express directly to judge McCarter's office. The federal express report to the court sent to judge McCarter was signed for using a false name. **None of the three** reports to the court made

it into the court records. The **docket sheet was falsified** by McCarter's actions, to reflect that the Petitioner had allowed **a default** to be entered against, Petitioner.

Prior to alleging judge McCarter was destroying court documents the, Petitioner requested the status of his three original reports to the court. The clerk's of the state district court, could not locate any of the three identical Petitioner's reports sent to the state court.

Opposing counsels report to the court was "**duly noted**" in an order signed by judge McCarter ending Petitioner's child support case. The Petitioner's case was ended by, unconstitutional, unethical conduct, fraud and forgery. Two identical court orders were issued ending the Petitioner's state civil case. The only difference between the orders was; **The order for the docket sheet had the correct date**. The order mailed to Petitioner by opposing counsel was **backdated eleven days** to prevent any appeal from being perfected from judge McCarters court. The mailing of the backdated order to Petitioner is the **crimes of mail and wire fraud**. In violation of 18 U.S.C.§ 1341 and 18 U.S.C. § 1343.

On Petitioner's **third appeal**; Petitioner, truthfully informed the Respondent's of what was occurring that judge McCarter was destroying court records, falsifying court records, to assist the attorney Weber and; prevent timely filing of appeals from judge McCarters court. Judge McCarter responded by filing a public ethics complaint against Petitioner. In Montana all ethics complaints are required to be confidential until formal

charges are filed. The ethics complaint by judge McCarter against Petitioner, stated that only one of Petitioner's pleadings were not filed because it contained obscenities. After the fraudulent ending of Petitioner's case; McCarter filed the confidential ethics complaint against Petitioner as part of the record in the closed state civil child support case. At Petitioners ethics hearing judge McCarter admitted there *were* no obscenities in Petitioners pleadings McCarter stated she "**just did not want to file Petitioners pleadings**."

McCarter mailed a copy of the confidential ethics complaint to Petitioner's former spouse. Former spouse informed Petitioner and daughter that it cost an additional **cash bribe** by attorney Weber to McCarter for the issuance of two state district court orders to end the case. Former spouse stated "**when you bribe a judge you get immunity**."

OUT OF STATE DISCRIMINATION

The acts were all directed at the Nevada forum where Petitioner and daughter have resided since 1999. Petitioner was additionally discriminated for residing out of state. The Petitioner was not a local good old boy and not participating in the sordid business of trading favors, campaign contributions or as alleged paying off the presiding judge to have Petitioner's case heard.

Child support laws were never intended to require out of state custodian parents to compensate judges to obtain an order of child support. A "TRO" is not designed to

remain in effect for years.

COMPELLING REASONS FOR REVIEW

This case involves questions of exceptional importance. 1.) The decision has so far departed from the accepted and usual course of judicial precedent, and has decided an important federal question that conflicts with relevant decisions of this Court. Thereby calling for an exercise of this Court's supervisory power. Key facts in the states decision, were also intentionally overlooked and ignored. 2.) To clarify the Constitutional guarantees applicable to all citizens including attorneys. 3.) **There is a compelling case for review of attorney Constitutional rights to speak out about and report public corruption**. This case involves attorneys **First Amendment** right to truthfully report corruption and case fixing activities within the legal system. 4.) The Court should, protect expand and affirm the public's right to honest, fair, just non-corrupt legal system. 5.) **The Court should clarify to what extent if any, attorneys lose their Constitutional Rights by being members of the bar.** 6.) There is a strong public policy of honesty, justice and equal protection for all under the rule of law. No individual or; entity is above the law. Public policy never requires **attorneys** or; **Litigants to trade favors, cash** or; Engage in acts of public corruption and bribery to have their cases heard or; Pleadings filed. Public confidence in the legal system will decline if corruption cannot be reported. 7. As a victim of crime Petitioner has a **First Amendment** right to report crime and speak out about case fixing activities that

destroyed his life.

ARGUMENT

This case was erroneously decided contrary to all precedent set forth by the United States Supreme Court hereafter referred to as **"USCT".** The facts as set out in Petitioner's filings, since the five judge review panel was established are unchallenged by the Commission. In fact the Commission filed no objections to the claims of misconduct and constitutional violations they (Commission) committed against the (victim) Plaintiff. The Petitioner's right to practice law was **un-constitutionally suspended** was **admitted** by the Montana Supreme Court see Exhibit 5. At various times justices Grey, Leaphart and Warner recused themselves. All three justices have now unrecuese themselves. Justice Rice has recused himself. **Public Policy** - No appeals can be taken from a judge's court when court records/docket sheets are being falsified, forged, hidden, destroyed and; state court orders are being withheld until appeal times have lapsed. The afore mentioned actions did in fact occur in Petitioner's state civil case. These acts continually occurred over a two and a half year period **and were directed at the Nevada Petitioner**.

Indefinitely suspending an honest attorney like Petitioner for blowing the whistle on case fixing between a judge and dishonest attorneys **undermine**s entire the legal system. The individuals involved in the case fixing activities include members of the "Commission". The "Commission" is appointed by the "MTSCT" and is charged with enforcing the ethical rules of attorney conduct that are based on the A.B.A. code of attorney

professional conduct.

PETITIONERS RIGHTS VIOLATED

The **"USCT"** has the authority to reinstate Petitioner's law license. (Emphasis added).

The denial of attorneys **First Amendment** right to report case fixing activities and the suspension of Petitioner's law license fosters further corruption; And deters other honest attorneys from reporting malfeasance It also sends a **chilling effect** throughout the legal community. Petitioners' ethics hearing was a predetermined sham; Lacking Due Process.

Petitioners' **First Amendment** rights were violated. Petitioner is being punished for reporting corruption. Attorneys as officers of the court have a duty to report corruption and a First Amendment right to speak out on matters involving judicial and public corruption. Being a member of a regulated profession does not result in the surrender of First Amendment rights, See *Thomas v. Collins*, 323 U.S. 516, 531 (1945). Petitioner's First Amendment rights were and are violated. To the contrary, professional speech may be entitled to "the strongest protection our Constitution has to offer." *Florida Bar v. Went-For -It, Inc.* 515 U.S. 618, 634 (1995); *Standing Committee on Discipline of the U.S. District Court for the Central District of California v. Yagman* 55 F. 3d 1430 (9th Cir. 1995) *Gentile v. State Bar of Nev.*, 501 U.S. 130 (1991). *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964). Petitioner's rights to inform the public and petition for redress of grievances have been interfered with. Petitioners' statements are true. Two of

three reports to the court were never located and have been destroyed. **Truth is a total defense.**

Petitioner is denied **pure First Amendment** rights the state needs to show a compelling interest to infringe on Petitioner's right to speak. There is no compelling state interest in fostering corruption and hiding case fixing activities and; criminal acts of elected officials from the public and legal community. (Emphasis strongly added).

THE ETHICS TRANSCRIPTS CLEARLY SHOW A NUMBER OF DUE PROCESS VIOLATIONS:

VOTE TO CONVICT PRIOR TO THE CONCLUSION OF THE ETHICS HEARING

TR P 7 LN 4-10 Chairman Warren of the Commission states as follows. "Just so both parties understand and know, that upon conclusion of this hearing the parties will each have the opportunity should they wish to submit requested findings and conclusions. After submission of the issues the Commission will make its own conclusions."

TR P 284 LN 21-25 Chairman Warred states " I should mention before we go off the record. I've been reminded, you both have the opportunity, if you like to submit proposed findings, conclusions and recommendations to the Commission. Would you like the opportunity?" **TR P 285 LN 6-23** "Chairman Warren: Mr. Nascimento: Yeah, I'd like to file something. **TR P 286 LN 14-25** Chairman Warren:

Simultaneous filings in 30 days. Thank you, gentlemen. Mr. Nascimento: Do I send 14 copies or just one? Chairman Warren: **I think that if you send just one for filing with the Commission that would be adequate and we can disseminate it among the Commission members**. Mr. Nascimento/Petitioner: Thank you." (The hearing concluded at 2:55 p.m.) The offer of submitting and considering Proposed Findings of Facts and Conclusions of Law and taking them into consideration was an egregious ruse. **All the ethics Commission did was wait until Petitioner left the hearing and voted him (Petitioner) guilty of false ethics charges 30 days prior to the final submission of evidence and closings arguments**.(Emphasis added).

ONE YEAR AFTER SUSPENDING PETITIONER'S LICENSE

One year on **May 21, 2004**, after the predetermined ethics hearing to frame and indefinitely suspend Petitioners law license occurred. The Commission initiated a phone hearing to assess costs of the unconstitutional ethics hearing against the victim; Petitioner residing in Nevada. This telephonic hearing was recorded and transcribed. Transcript references in pertinent part. **TR P 8 LN -19-25** "Chairman Warren: "Any other preliminary issue....Mr. Nascimento:-Sure, **I would like to know when the date, place, and time of the hearing to convict me was held**. Chairman Warren: Mr. Nascimento:, I don't know what hearing you are talking about. **TR P 9 LN 1-5** Mr. Nascimento: You had to take a vote to convict me....Chairman Warren: Mr. Nascimento, you know, **the Commission deliberated**

after the hearing and made its decision. There was no other hearing." (Emphasis added). A clear violation of Petitioners due process rights voting Petitioner guilty, 30 days before submission of the Proposed finding of Facts and Conclusions of Law were due. For the record Petitioner was also **denied transcripts** to write his Proposed Findings of Facts and Conclusions of Law, another due process violation.

ETHICS COMPLAINT UNFOUNDED

Judge McCarter's ethics complaint stated that only one pleading titled "report to the court" was not filed because it contained obscenities. This claim by judge McCarter is 100% false. The report to the court was pre-read and proof read by an experienced local attorney prior to being submitted to be filed into the court records. Petitioners' pleadings contain no obscenities.

Transcripts in pertinent part of the ethics hearing to support Petitioners contention that his constitutional rights were violated in suspending his law license. **TR P 33-34** Testimony of judge McCarter: Nascimento was admonished to clean up his language.....He was notified of the pleadings being rejected. Q. Nascimento: **How was I notified the pleading being rejected?** McCarter: A. **I don't remember it was too long ago**. Q. Nascimento: Exhibit 3, **can you point out any obscenities in Exhibit 3?** For the "USCT's" information exhibit 3 at the ethics hearing; was, the Petitioner's report to the court that judge McCarter falsely claimed contained obscenities. Judge McCarter claimed this one

pleading was the only document not filed because, it contained obscenities. A. (Judge McCarter): **I don't find anything that's obscene**. Q. Nascimento: **how do you balance that with the fact you informed the Montana Supreme Court it contained obscenities as one of the reasons that it was not filed?** A. Judge McCarter: I don't think....I remember seeing something you wrote accusing Robyn Weber and to me it was obscene, ...**I just don't remember**. Mr. Nascimento: The reason that this case is before you now is because for two and a half years an ex-parte order was in effect, opposing counsel Robyn Weber, never returned phone calls, fax's or letters and the judge would take no action.

One of the three missing report to the court Petitioner reported destroyed was located in an unmarked manila file folder. The report to the court was then ***disassembled*** and passed off as all three reports to the court. The report to the court consisted of a pleading with two affidavits attached as exhibits A and B. Evidence was fabricated to convict the Petitioner. Without discovery the Petitioner had no opportunity to view the fabricated evidence presented by the Commission and Special Counsel Kaleczyc.

Judge McCarter then offers her explanations for the one of three pleadings Petitioner reported destroyed turning up six months later mysteriously in an unmarked manila file folder which contained numerous of Petitioners missing pleadings. For the record two of the three specific pleadings Petitioner reported destroyed

have never been located. They are apparently missing and presumed destroyed. **TR P 35-16** Q. (To judge McCarter): **As a district court judge for 13 years how am I suppose to know that this was filed in a lodged case file?** A. (McCarter): ***I don't know***. Q. (To judge McCarter): **Is there a specific statue that allows you to file in the lodged case file?** A. (McCarter): No, it's in my inherent authority to operate the Court. Q. (To judge McCarter): **It's in your inherent authority. Is there any statue that gives you that inherent authority?** A. (McCarter); I'm a constitutional officer, **no.**

The Commission and "MTSCT" abused their authority by ignoring the facts and evidence. There was no evidence presented to convict Petitioner of ethic violations beyond a reasonable doubt. In fact the original charge in the complaint was that the Petitioner was including obscenities in his pleadings. This was proven false when judge McCarter nor anyone else could find any obscenities in Petitioners pleadings or documents In fact judge McCarter finally admitted **TR P 80 L 3-4** ...judge McCarter states " I decided that it shouldn't be filed." **The judge admits that she just did not want to file Petitioners pleadings.**

Petitioner question to judge McCarter at the ethics hearing **TR P 70 L 9-17** Q. By Petitioner to judge McCarter) **But if you look at the record, it assumed no response was filed if you look at the docket sheet; is that correct?** A. (judge McCarter) Yes. Q. (to judge McCarter) **And if it looks from the docket sheet like**

no response was filed wouldn't that aid opposing counsel? A. (judge McCarter) objected to by Special Counsel Kaleczyc and sustained by chairman of the ethics commission.

BACKDATED DISTRICT COURT ORDER

Transcripts in pertinent part. **TR P 41-43** Mr. Nascimento: I gave the witness (judge McCarter) the original and it includes an envelope from attorney Robyn Weber on the back. "That document is out of sync 11 days with the docket sheet." Q. **(By Mr. Nascimento) Is that your signature on that document, Your Honor?** ...A. Yes. Q. (to judge McCarter) **Is that your signature?** A. Yes. Mr. KALECZYC (who is the Special Counsel) This document appears to be some order that was apparently entered by judge McCarter.....Mr. Nascimento: ....It shows the documents have been backdated for an offer of proof, it shows my assumption that documents were destroyed. Unless there were two of these documents in the court filed in my case and they were backdated and they were changed to keep me from appealing out of judge McCarter's courtroom.....(Special Counsel Kalecezyc states) This was sent to Mr., Nascimento by the Weber Law Firm.

PETITIONER ALLEGES JUDGE McCARTER FIXED ATTORNEY WEBER'S ETHICS COMPLAINT

Transcripts in pertinent part. Q. (By Mr. Nascimento, to judge McCarter): **Did you intervene in attorney**

Robyn Weber's disciplinary hearing? Special Counsel objects judge McCarter is not required to answer.

NO DISCOVERY-NO PRETRIAL HEARING

The ethics hearing transcripts hearing suspending Petitioner's law license in pertinent part from held on **May 15, 2003** ethics hearing. **TR P 8 LN 6-9** "Chairman Warren: Mr. Nascimento, have you any qualms or objections to the procedure? Mr. Nascimento: Yes, I do. I don't believe I received the whole file. TR P 8 LN 17-24 Petitioner Nascimento states " I've had no contact with Mr. Kaleczyc prior to a week before this hearing, no phone contact, no responses to letters, no responses to faxes and- - Chairman Warren: Well aside from the response issue. The unconstitutional hearing is moved along Petitioner had **no discovery, no pretrial** and has been denied depositions and all forms of discovery. It was a trial by ambush with Petitioner denied all basic constitutional guarantees to prepare a defense. **TR P 282 & 283 Ln 22-25** " Petitioner Nacimento "If the documents had been recorded like I believe they should be by statue we wouldn't be here today, thats why we have rules and .....I played by the rules and I'm before the Commission.

No one can defend under such circumstances. Petitioners' due process rights were violated. Even the "MTSCT" has admitted violating Petitioner due process rights. See exhibit 5.

CHANGES MADE DUE TO ALLEGATIONS OF

CASE FIXING AND CONSTITUTIONAL VIOLATIONS

Petitioner was the last attorney subject to discipline under the old disciplinary system. It was abolished after numerous attorneys complained the process was unconstitutional and corrupt. See *Goldstein v. Commission On Practice*, 995 P2.d 923 (Mont. 2000). The Montana state constitutional guarantees set out in *Goldstein* were ignored in Petitioners case. In fact a complete reading of *Goldstein* reveals some members of the "MTSCT" do not review the case See Justice Trieweliers dissent. In *Goldstein*. Chief Justice Karla Grey states due to the confidentiality of the "MTSCT" courts decisions the public will never know if these cases are even reviewed. *Goldstein* states the"MTSCT" relies on the "Commission" to be their "eyes and ears."*Goldstein* appears to show the "MTCT" is not supervising their appointed agents the "Commission".

The Montana state bar even joined in *Goldstein* challenging the constitutionality of the "Commission". Some amici accused the "Commission" of hiding evidence to gain convictions. The "MTSCT" is well aware they have a problem with the Commission; But allowed their compromised agents to remain on the "ethics commission".

Attorney Gary Davis vice chair of the ethics commission was identified as judge McCarters Commission case fixing accomplice. Former spouse

explained how attorney, Davis would take care of the ethics complaint against attorney Weber for judge McCarter. Gary Davis recruited his acquaintances attorneys Dalthorp and Kaleczyc to assist in framing Petitioner. All were acting as agents of the "MTSCT". "MTSCT"agent attorney Dalthorp on three occasions spoke with Petitioner by phone from Montana to Nevada. Each phone call involving Dalthorp was a series of escalating threats that Petitioner would be disbarred if Petitioner did not turn over the backdated state court order and any other documents showing physical evidence of case fixing activities involving judge McCarter and her accomplices. These threats constituted the interstate torts of extortion. Petitioner refused to become involved in crimes of obstruction of justice and a cover-up and reported what was occurring to law enforcement. When Commission attorney Dalthorp was informed Petitioner had notified law enforcement, Dalthorp withdrew.

Gary Davis then had attorney Stanley Kaleczyc replace attorney Dalthorp as Special Counsel and Prosecutor. For ten months ethics chairman attorney John Warren, ethics vice chair attorney, Davis and Special Counsel worked as investigators, co-prosecutors preparing the charges against; Petitioner and devising strategies to convict/frame Petitioner. See exhibit 3 & 4. During this ten month period e-mails were exchanged between attorneys Warren, Davis and Kaleczyc discussing how to prosecute the case and draft the ethics complaint. At the ethics hearing Chairman Warren and

vice chair Davis ran the hearing then voted Petitioner guilty of ethics violations. They served as investigators, prosecutors, judge and jurors. (Emphasis added).

Prior to the rigged ethics hearing held to frame Petitioner the; Petitioner made numerous requests for discovery and was denied discovery. Special Counsels refused to communicate with Petitioner. Chairman Warren denied Petitioner a pretrial hearing. Petitioner was denied witnesses needed to defend. The "Commission" was violating their own operating rules. The "MTSCT" was informed of the torts and criminal acts of the Commission members .

The "MTSCT" replied that they would not micro manage the "ethics commission". The "MTSCT" was also provided a copy of **a taped threat** against Petitioner by the Commission.

Petitioner also spoke with ethics chairman Warren who mislead, Petitioner stating he did not know why Special Counsel was refusing to allow discovery or speak with Petitioner. E-mails between ethics chair and special counsel show this was substantial contact and discussions between, Commission chair Warren and Special Counsel Kaleczyc. The Commission chairman and vice chairman Gary Davis were in constant contact and working with Special Counsel to convict/frame Petitioner. Engaging, in **multiple ex patre** contacts.

The "MTSCT" was informed that the ethics hearing that framed Petitioner was a rigged fraud. Petitioner was

denied discovery. Petitioner was **denied voir dire**. Petitioner was **denied an opening statement**. Petitioner was **denied witnesses** needed to present a defense. Petitioner was **denied a pre-trial** hearing. Petitioner was **denied exculpatory evidence** - at the ethics hearing ethics attorney/investigator Dalthorp stated he destroyed all his notes and records prior to the hearing.

Exculpatory evidence was destroyed. Attorneys Davis, Dalthorp and Special Counsel Kaleczyc have hundreds of pending cases before judge McCarter. The "MTSCT" knew severe **conflicts of interests** existed by a Commission members. The "Commission" denied voir dire to hide their conflicts. See *Lifjiberg v. Health Services Acquisition Corp*., 486 U.S. 847 (1988). Held failure to reveal conflicts is **reversible error violating due process**. Petitioner was given a **timed two minutes** to present his defense and had to **speed talk** while chair Warren counted down the two minutes. A license to practice law **cannot be divested** without substantial due process. See *In the Matter of William R. Ming, Jr. an Attorney, Appellant*, 469 F 2d 1352 (1971). The fundamental requisite of due process is the opportunity to be heard, an opportunity present your case and defend. Petitioner received neither. Investigator Dalthorp and Special Counsel Kaleczyc who are both attorneys have hundreds, if not thousands of cases and motions pending before judge McCarter. *Young v. United States*, 481 U.S. 787, (1987) at 788 and 789 held that "when a private attorney is appointed as a prosecutor he must be disinterested. That the **harmless error doctrine cannot**

apply since such an error is so fundamental and pervasive that it **requires reversal without regard to the facts** or circumstances of the particular case." It should be noted that some of the attorney members on the "ethics commission" also have hundreds of pending cases before judge McCarter. (Emphasis strongly added).

EVIDENCE DESTROYED - CASE FIXED

Petitioner spent months trying to depose investigator Dalthorp and made requests for his notes. Petitioner was denied a fair opportunity to present a defense to the bogus ethics charges. Petitioner was denied access to the entire ethics file to look for exculpatory evidence that has not yet been destroyed. Petitioner was also **denied a closing argument**.

The torts of fraud and perjury were committed by the Commission, when Petitioner was offered an opportunity to submit Proposed Findings Of Facts and Conclusions of Law hereafter **" PFCL "**. The Commission on the record allowed Special Counsel and Petitioner 30 days to submit their **"PFCL"**. This was false all the Commission actually did was waited until Petitioner left the room at the conclusion of the unconstitutional ethics hearing and voted Petitioner guilty of ethics violations that same day. This was a (**30 day early vote to convict Petitioner**) was basically fraud and perjury was known to Special Counsel and the "Commission". This fraud and perjury was intentionally, expressly designed to damage the Petitioner and violate his constitutional rights. For the record Petitioner was

denied transcripts to write his "PFCL"The "Commission" hid this early vote for over one year from Petitioner. The ethics chairman and Commission, admitted that the vote to convict/frame Petitioner of ethics violations was taken at the conclusion of the ethics hearing. Thirty days prior to the agreed upon date for Petitioner to submit his "PFCL" This admission was made during a telephonic hearing initiated by the Commission from Montana to Nevada. The phone hearing was to assess costs against the Petitioner for the unconstitutional ethics hearing. The Commission, committed perjury and obstruction of justice in hiding their fraud for over one year. The "MTSCT" is aware the Commission committed these unconstitutional, nefarious and improper acts against the Petitioner.

IMMUMITIES CLAUSE OF ART. IV, 2

The requirement that a non resident attorney be treated differently than other well connected good old boys/attorneys is a Constitutional violation. The actions taken against the Petitioner violates the Privileges and Immunities Clause of Art. IV, 2 of the United States Constitution. See Supreme Court Of New Hampshire v. Piper, 470 U.S. 274 (1985). The requirement that non-resident attorneys bribe a judge(s) or member's of the "Commission" or; engage in criminal activities that include obstruction of justice effects the national economy. These requirements also violate public policy and under mind the integrity and functioning of the legal system. "The practice of law a fundamental right. Piper

at 470" The nonresident's interest in practicing law is a "privilege" protected by the clause.

FALSIFYING COURT RECORDS

The Commission is compromised mainly of attorneys, the "MTSCT" and clerk of the state and supreme court are all well educated. They know that falsifying docket sheets, hiding, stealing, forging court documents, backdated orders, and issuing two sets of orders to end a case and prevent appeals; The destruction and falsification of ethics records are torts, illegal, unethical and unconstitutional acts. The "MTSCT" knows that votes to convict individuals are not secretly taken prior to the submission of "PFCL". The "MTSCT" knows transcripts are needed to write "PFCL and appeals. The "MTSCT" knows that pleadings arriving at the office of clerk of court are filed and; Not to be stolen, hidden, destroyed or otherwise tampered with. The "MTSCT" knew of the multiple unconstitutional actions being committed by their agents the Commission would harm the Nevada Petitioner.

FIFTH AMENDMENT

The facts contained in Petitioner's writ violate the Fifth Amendment right by depriving Petitioner of five years of his life, liberty and property (law license) and reputation without due process of law. The clerks of both the district court and "MTSCT" failed to perform his duties to keep records and record pleadings or report the

corruption.

SIXTH AMENDMENT

The facts contained in Petitioner's writ violate the Sixth Amendment right by depriving Petitioner a speedy review of his unconstitutional law license suspension. The five judge panel has had since July 01, 2004, to review the taking of the Petitioner license.This violates Petitioner's right to a speedy trial and review. MTSCT Justice Rice publicly informed Petitioner that there were some **serious due process problems and issues in** his license suspension that will be ignored and hidden. See exhibit 5. Justice Rice did not sign the latest decision.

FOURTEENTH AMENDMENT

The facts contained in Petitioner's writ violate the Fourteenth Amendment The facts clearly show the denial of Petitioner's life and; Property (law license) and reputation without any semblance of due process of law. The petitioner also has been denied equal protection of the laws. The manor in which Petitioner was un-constitutionally convicted is in violation of the Fourteenth Amendment.

INSUFFICIENT EVIDENCE PRESENTED TO CONVICT THE PETITIONER

The transcripts also demonstrate there was insufficient evidence to convict Petitioner of ethics violations beyond a reasonable doubt. In fact no valid reason was ever given for not recording Petitioners filings. No valid

reason was ever given for **issuing two sets of sate district court orders to prevent the state civil case from ever being heard.** There was no reason not to file Petitioners report to the court or any other pleadings sent to the state district court. Judge McCarter **TR P 29 L 5-6** states referring to the reports to the court that she Ordered, be filed by both parties. Judge McCarter referring to Petitioners three identical reports sent to ensure they were filed and made part of the record **TR P 29 L 5-6** A. "I (judge McCarter) just didn't want it in the court file." The judge took actions in direct violation of the rules governing state and federal recording statues. Without issuing any Order Petitioner's pleadings were being pre-read and diverted from being recorded. Two of Petitioners reports to the court are still lost, stolen and have never been found and are apparently destroyed.

THE STATE RECORDING STATUE IS CLEAR

For the record the Montana Code Annotated hereafter referred to as "MCA" codifies state law in Montana. states in pertinent part states as follows. MCA7-4-261, the role and duty of the clerk as defined by statue are to keep records and books and MCA 7-4-2617, sections 1,3 and 4 further state the procedure is to record documents when any instrument ...to be recorded ...it must be immediately entered into the county clerk records reception book. The clerk **must** record said document without delay and **must** note the exact time of its reception. Judge McCarter was circumventing the recording process by apparently having Petitioners

pleadings not filed without the judges consent. Thereby, **falsifying the court docket sheet**. Thereby causing Petitioner filings not to be recorded. Thereby causing the destruction of at least of two of Petitioners pleadings he reported destroyed. Additionally the **dismantling** of the one pleading located in a separate mysterious unmarked or previously accounted for manila file folder meets the definition of destruction. The report to the court that was **disassembled** was destroyed, when it was taken apart and presented as three different pleadings. This meets the definition of destruction. This report to court was located then, destroyed to make it appear to be three different filings by Petitioner.

The burden of proof for a conviction of ethics violations is the same as a criminal conviction beyond a reasonable doubt. The states burden has not been met. Additionally the above constitutional rights of the Petitioner were violated. Petitioner was convicted by fraud, perjury and fabricated evidence.

CONCLUSION

For the foregoing reasons The United States Supreme Court grant this writ of certiorari.

Dated February, 23, 2007. **Very respectfully submitted,**

Kevin E. Vainio
Attorney for Petitioner
27 West Park Street
Butte, MT 59701
(406) 782-3357

Appendix i

APPENDIX OF EXHIBITS ATTACHED **PAGE**

Exhibit one attached Order Montana Supreme Court September 27, 2006.....1

Exhibit two attached Order indefinitely suspending Petitioner.....3

Exhibit three attached Email between Commission chairman and Special counsel ex parte consultation in convicting Petitioner.....8

Exhibit four attached Email between Commission vice-chairman and Special counsel ex parte consultation in convicting Petitioner 10

Exhibit five attached Montana Supreme Court admits violating Petitioners' Due Process rights.....12

EXHIBIT SIX ATTACHED Opinion Montana Supreme Court dated May 9, 2006.....23

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 02-778

FILED

SEP 27 2006
Ed Smith
Clerk of The SUPREME COURT

IN THE MATTER OF)
JOSEPH F. NASCIMENTO,)
An Attorney at Law)
Respondent)

On May 9, 2006, this court ordered Respondent Joseph Nascimento to pay costs of proceedings before this Court's Commission on Practice in the total sum of $2,809.94. Nascimento was directed to pay such costs to the Clerk of this court within 30 days, Nascimento has filed to comply with our Order. According,

IT IS HEREBY ORDERED that our Order issued on May 9, 2006, requiring Joseph Nascimento to pay the costs of proceedings before the Commission on Practice totaling $2,809.94 should be and hereby is converted into a judgment against Nascimento, to be filed in Lewis and Clark County and in any other county in this State in

EXHIBIT ONE

owns real property, and proceedings to execute on said judgment shall be commenced. Furthermore,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is awarded in favor of the State of Montana and against Joseph Nascimento in the sum of $2,809.94, with interest to accrue thereon from this date forward at the judgment rate. Execution shall issue forthwith. The Clerk of this Court shall proceed to file said judgment in the appropriate records of Lewis and Clark County. The Clerk of this Court is further directed to mail a true and correct copy of this Order to Joseph Nascimento personally, and by certified mail, return receipt requested, to his last known address as reflected in the records of the Clerk of this Court; to John Warren, Chairman of the Montana Supreme Court Commission on Practice; to Stanley T. Kaleczyc, Attorney at Law; to Shauna Ryan, Executive Secretary for the Commission on Practice; to Mike McGrath, Montana Attorney General; and to the Chief Legal Counsel for the Department of Revenue, Room 465 Mitchell Building, Helena, Montana, 59620.

DATED this 27th day of September, 2006

Karla M Gray
Chief Justice
Patricia Cotter
John Warner

W. William Leaphart
James C. Nelson
Brian Morris

FILED
Jan 21, 2004
Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

IN THE MATTER OF JOSEPH F. NASCIMENTO, An Attorney at Law Respondent	ORDER

The Commission on Practice of the Supreme Court of the State of Montana filed its Findings of Fact, Conclusions of Law, and Recommendations of the Commission in this matter on September 23, 2003. After some delay by virtue of a request for transcript and the filing of a motion to dismiss, this Court directed Nascimento to file his objections to the Findings and Conclusions of the Commission on or before Friday, December 12, 2003 (Order dated October, 2003). On December 15, 2003, Nascimento filed his "Findings of Facts and Conclusions of Law and Recommendations of the Montana Supreme Court." In his filings, consisting if thirty-six pages of narrative together with twenty exhibits, Nascimento denies having violated the Montana Rules of Professional Conduct. Moreover, he continues to allege that the Honorable Dorothy McCarter, Lewis and Clark County District Court, has destroyed evidence and court documents, and that she has "fixed" an ethics complaint against his ex-

EXHIBIT 2

wife's attorney and received "kick-backs" from Nascimento's ex-wife in exchange for ruling in her favor in the divorce action. He further charges that Judge McCarter and others whom he believes have conspired with her, should be criminally prosecuted. The other allegations in Nascimento's Findings and Conclusions are too numerous to mention and are not relevant to the proceedings before this court.

The Commission on Practice has filed a brief in reply to Nascimento's Findings of Fact and Conclusion of Law, and has also filed a Motion to Strike Exhibits. The Commission contends that the subject exhibits were not admitted into evidence at the hearing before the Commission, and should therefore be stricken from the record and not considered by this Court. In an effort to bring this matter to a resolution, we deny the Motion to Strike Respondent's Exhibits. This Court will determine what bearing. If any Nascimento's exhibits shall have on the proceedings before us.

Although Nascimento's recent pleadings are denominated "Findings of Fact and Conclusion of Law and Recommendation of the Montana Supreme Court", we deem them to be Nascimento's Objections to the Findings, Conclusions and Recommendations of the Commission. Accordingly, this matter is now deemed submitted to this Court for disposition.

Formal disciplinary proceedings were filed against Mr. Nascimento by special counsel for the Commission on Practice, in December, 2002. In the complaint, the Commission alleged that Nascimento's allegations that

Judge McCarter destroyed documents or evidence violated three separate rules of professional conduct, namely, Rules 8.2(a), 3.3(a)(4), 8.4(d). A hearing on the formal complaint was held on May 15-16, 2003. Thereafter, the Commission issued its Findings of Fact and Conclusions of Law, concluding that Nascimento violated the Montana Rules of Professional Conduct as alleged in the formal complaint, and recommending to this Court that Nascimento be indefinitely suspended from the practice of law with minimum suspension period of two years, and further that he be required to pay for the costs incurred by the Commission associated with the prosecution of this matter.

The Commission notes in its Findings of Facts and Conclusions of Law and Recommendations, and in its most recent filings that, despite uncontroversial evidence to the contrary, Nascimento continues to accuse Judge McCarter of destroying court documents and of engaging in criminal misconduct. The Commission also notes that despite the despite the facts the sole issue before the Commission is whether Nascimento committed one or more ethical violations, he continues to attempt to re-litigate matters already put to rest in his divorce proceeding. The Commission has no jurisdiction over alleged misconduct by members of the judiciary, as such matters are the sole providence of the Judicial Standards Commission. Finally, the Commission renews its ongoing contention that it has applied the rules of procedure and the evidentiary rules governing evidence in the deposition of these proceedings, and that Nascimento has not been denied his constitutional rights. This Court has reviewed the entire record. We conclude

that clear and convincing evidence substantiates the findings of fact, conclusions of law, and recommendations of the Commission, which are available for public review in the Office of the Clerk of the Court. We hereby adopt those Findings, Conclusions and the Recommendations of the Commission, in their entirety, Accordingly.

IT IS ORDERED:

1. Joseph Nascimento is hereby suspended indefinitely from the practice of law in the State of Montana with a minimum suspension period of two years, commencing on March 1, 2004. Nascimento is reminded that under Rule 23, Rule of Lawyer Disciplinary Enforcement, he is required to give notice to his clients, co-counsel, and any opposing counsel in pending matters in this state, of his suspension from the practice of law, within ten days of the date of this Order.

2. Joseph Nascimento is ordered to pay the costs of these proceedings, the amount of which will be set in a forthcoming letter from the Secretary for the Commission on Practice. Nascimento shall have ten days after service of the Secretary's statement of costs in which to file objections, and if so desired, request a hearing before the Commission on whether the amount of such costs are reasonable and necessary. The Commission shall thereafter recommend an amount of costs to be imposed, and shall file its recommendation, along with any objections thereto, with this Court, which shall then issue an appropriate order assessing costs. Rule 7, R.L.D.E.

IT IS FURTHER ORDERED that the Clerk of this Court serves a copy of this Order upon Joseph Nascimento by certified mail, return receipt requested, and shall mail copies hereof by ordinary mail to special counsel Stanley T. Kaleczyc and to the Chairman and Secretary of the Commission on Practice. The Clerk is further ordered to mail copies of this Order to the District Courts of the State of Montana, to the Clerk of the Federal District Court of Montana, to the Circuit Court of Appeal of the Ninth Circuit, and to the Executive Director of the State Bar of Montana.

DATED this 20th day of January, 2004.

Patricia Cotter

James C. Nelson

W. William Leaphart

Jim Rice

CHIEF JUSTICE KARLA M. GREY AND JUSTICE JOHN WARNER DID NOT PARTICIPATE IN THIS MATTER

BROWNING, KALECZYC, BERRY & HOVEN, P.C.
ATTORNEYS AT LAW

G. Andrew Adamex
Kimberly A. Beaty
J. Daniel Hoven
Leo Berry
Stanley T. Kaleczyc
Catherine A. Laughner
Brand G. Boyar
R. Steven Browning
David M. McLean
Katharine Browning
Sara B. Stanton
Mark D. Donnelly
Mark R. Taylor
Mark E. Etchart
Kimberly L. Towe
Oliver. H. Goe
Steven T. Wade
Amee Grmolez
Leo S. Ward

Mailing Address
139 North Last Chance Gulch
Post Office Box 1697
Helena, Montana 59624
Telephone (406) 443-6820
Telefax (406) 443-6883
bkbh@bkbh.com
bkbh@bkbh.com

December 13, 2002
Sharon Parish
Justice Building
215 N. Sanders
Helena, MT 59601

SENT TO
Chairman Commission on Practice
12/13

RE: Joseph Nascimento Complaint

Dear Sharon:

Our internet service is down this morning therefor

EXHIBIT 3

I could not e-mail a draft of the enclosed Complaint to you.

Please review this and call me with any questions or changes.

Sincerely,

BROWNING,
KALECZYC, BERRY & HOVEN, P.C.

By

Stanley T. Kaleczyc

BROWNING, KALECZYC, BERRY & HOVEN, P.C.
ATTORNEYS AT LAW
G. Andrew Adamex
Kimberly A. Beaty
J. Daniel Hoven
Gulch
Leo Berry
Stanley T. Kaleczyc
Catherine A. Laughner
Brand G. Boyar
R. Steven Browning
David M. McLean
Katharine Browning
Sara B. Stanton
Mark D. Donnelly
Mark R. Taylor
Mark E. Etchart
Kimberly L. Towe
Oliver. H. Goe
Steven T. Wade
Amee Grmolez
Leo S. Ward

Mailing Address
139 North Last Chance

Post Office Box 1697
Helena, Montana 59624
Telephone (406) 443-6820
Telefax (406) 443-6883
bkbh@bkbh.com
bkbh@bkbh.com

December 13, 2002

Gary Davis
Luxan & Murfitt, PLLP
24 West 6th Ave., 4th Floor
Helena, MT 59601

RE: Joseph Nascimento Complaint
Dear Gary:

EXHIBIT 4

Our internet service is down this morning therefor I could not e-mail a draft of the enclosed Complaint to you.

Please review this and call me with any questions or changes.

Sincerely,

BROWNING,
KALECZYC, BERRY & HOVEN, P.C.

By

Stanley T. Kaleczyc

Appendix pg. 12

BEFORE THE COMMISSION ON PRACTICE
IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. 02-778
Commission on Practice
File No. 01-4487

FILED
March 30, 2005
Ed Smith
Clerk of the Supreme Court
State of Montana

In The Matter of
Joseph F. Nascimento
An Attorney at law,
Petitioner

CONCERNING

ADMISSIONS OF SERIOUS DUE PROCESS PROBLEMS AND ISSUES

PETITIONER'S CASE
Directed to the five judge panel assigned to Review this matter.
Not the Montana Supreme Court which has recuse itself.

Comes Now the Petitioner at allege as follows:

Petitioner attended the Continuing Legal Education hereafter referred to as "CLE" seminar held in Butte, MT on March 17, 2006. The CLE titled "DISCOVERY".
The topics discussed were: **The truth-Full discovery**" no hiding the ball"-**an equal playing field for everyone.** Full discovery; **that we have no more trial**

EXHIBIT 5

by ambush in Montana anymore. Ethics and how the legal community are **guardians of the public trust** and the **duty to be fair and fully truthful.**

A four judge panel took the stage. The four judge panel included in order is listed in their respective seating order from right to left facing the audience. 1. Honorable District Judge Jeff Sherlock 2. Montana Supreme Court Justice Jim Rice 3. Montana Supreme Court Justice William Leaphart 4. Honorable District Judge Ingrid Gustafson.

The above judges all spoke of full discovery rights; full due process; not taking sides; the guarantee of an equal playing field; the seeking of the truth and fairness. The Honorable judge Gustfson stated "we no longer have trial by ambush in Montana anymore." With the highest amount of respect due them neither District Judge Sherlock or Gustafon knew the true facts of Petitioners case. (Emphasis added).

Petitioner stood up and stated " my name is Joe Nascimento my license to practice law was indefinitely suspended. What happened to my due process rights? I was denied discovery. I was denied witnesses needed to defend. I was denied an opening statement. I was given a timed two minutes to present a defense. At this point I stated at the ethics hearing there were tears from my eyes. I knew I was being framed. I was denied a closing argument. The Commission On Practice offered me thirty days to submit Proposed Findings of Facts and

Conclusions of Law. In some jurisdictions referred to as written closing arguments. The Proposed Findings were to be submitted in thirty days. I was denied transcripts to write my proposed Findings and Conclusions of Law. I wrote my closing arguments without transcripts. Then over a year after my law license was indefinitely suspended the Commission admitted that they that they just waited until I got to the parking lot to vote me guilty of ethics violations. This early vote was admitted in a telephone hearing to assess costs against me; over a year after my license was suspended.

There was a stunned look on all four judges and attorney's attending the CLE's faces. There was approximately 60-90 seconds of dead silence. Judge Sherlock passed the microphone to Justice Rice, Rice to Justice Leaphart-to Judge Gustafson and back up the line.

Finally Justice Rice showed the courage to muster an answer. Montana Supreme Court Justice Rice stated "**Joe there were serious due process problems and issues in your case. That is why we changed the system after your case.**" (Emphasis added).

Petitioner replied "so what happens to me my life and law license are in limbo." There was no response just awkward silence. One attorney spoke up and said I am not taking sides but, how is he suppose to defend himself? There was no answer from the judges. The questioning abruptly ended.

Justices Rice and Leaphart made a quick exit using the side conference door. Petitioner followed them and observed Justice Leaphart leaving at an accelerated rate slightly less than a jogging pace. Justice Leaphart was followed by Justice Rice. Justice Rice was exiting at a rapid pace also. Justices observed Petitioner looking at them heading for the parking lot exit.

Justice Rice turned and walked toward the Petitioner. To his credit Justice Rice spoke with Petitioner. Petitioner who was on the verge of tears . At Petitioner's request the conversation took place in an adjoining empty dining area. Justice Rice to his credit stated he prays everyday to do the right thing but sometimes the right thing is not done. That he could not discuss my case in particular. That they(Montana Supreme Court) had no contact with the five judge panel assigned to hear my case. That they don't even know what they(the five judge panel) is doing. See my Petition for Reinstatement filed with the clerks office and addressed to the five judge panel assigned to review my case and issue appropriate orders. It also sets out the case facts and transcripts. Justice Rice also stated maybe god wants you not to be a lawyer. I earned my law license. Maybe god wants me to expose the corruption and put an end to the god old boy case fixing of the citizens of Montana.

In spite of that fact the Montana Supreme Court ordered that the Petition for Reinstatement be sent by Petitioner to every district state and federal judge in Montana. This filing accompanies said Petition for Reinstatement.

Possible Four Reasons the Montana Supreme Court would issue an Order in a case they recuse themselves from and the comments made at the CLE

The reason that Supreme Court would issue such an Order in a case that they have recued themselves is beyond me. I can only speculate it was to accomplish either: **1. Embarrass Petitioner. Petitioner is not embarrassed for faithfully executing his duty a as attorney.** Attorneys and judge in attendance were stunned at the revelations and accompanying comments were generally in shock of what had been hidden from the public and fellow judges.

Some of the comments included: 1. Petitioner approached Judge Gustafson and stated I am not a nut this has cost me over $100,000.00. Do you want a copy of the transcript. Judge Gustafon said no. They put you through hell.

2. Another individual male who I assumed was a judge or very smart attorney asked for a copy of my Petition for Reinstatement and transcript references. At the next break this individual stated you left out the most important transcript reference of the May 15, 2003 ethics hearing held to frame Petitioner for reporting case fixing activities between District Judge McCarter and her case fixing/buddies. And pointed to and stated "look at what you forgot to highlight" and pointed at TR P 286 L 18-21which states "**CHAIRMAN WARREN: I**

think that if you just send one for filing with the Commission that would be adequate and we can disseminate it among the Commission members." "His reply was a lie." It shows they lied to you, committed ethics violations, fraud, crime and you have the right to be upset. I am surprised you didn't file an obscenity laced reply.

3. Two attorneys commented on the hasty departure of both Supreme Court Justices. One stating they usually stay to eat and speak with the brown nosers.

4. One attorney asked what Justice Rice had so say apparently observing our entry into the closed dining area. Petitioner, declined to answer what was said between Petitioner and Justice Rice.

5. Another attorney stated "I thought Rice was a Christian." I said he appears religious. Then I was told a Christian would have stood his ground and if your due process rights were violated would have written a strong dissent. Petitioner stood up for Justice Rice stating "at least he had the guts to honestly answer my question and did not run away." Then this attorney commented; what about his oath taken on a bible. Petitioner offered no response and walked away. For the record Petitioner is catholic and has no knowledge if Justice Rice is a Christian or not he seem to believe in god.

6. The Yellowstone County attorney briefly spoke with Petitioner he stated one of the five judge panel was a

former prosecutor and one a former county attorney. They could be counted on to do the right thing. (Emphasis added).

This paragraph is addressed to Justice Leaphart. In 1983 or 84 Petitioner had a case with your father as opposing counsel. Petitioner remembers his office was full of aw books piled high. Attorney Leaphart, Sr. had a better case than Petitioner. He still offered a fair settlement. Petitioner asked him why such a fair and reasonable offer was given to settle the matter. Attorney Leaphart, Sr. replied to the effect if you do the right thing you never have to look over your back. Petitioner never knew what this meant until reflecting on the days events in Petitioners hotel room. With all due respect Justice Leaphart looked like a kid caught with his hand in the cookie jar. If you had done the right thing you could have answered the question and would not have to run away and hide. No disrespect intended.

Was the Order by the Supreme Court to submit the Petition for Reinstatement; while the case is still before the five judge panel issued to: **1. To embarrass the Commission on Practice? 2.** To **embarrass judge McCarter**? Which judging from the reaction is what happened.

Did the Supreme Court or; five judge panel think the Petitioner or; his family would not be severely injured and traumatized by this horrendous ordeal indefinitely suspending; Petitioners law license? Did the Supreme Court or five judge panel think allow the family name to be tarnished? Did the Supreme Court or five judge panel

think Petitioner or: his family would ever walk away? Would members of the Supreme Court or five judge panel like to be treated like the Petitioner? The embarrassment and feelings that Justices Rice and Leaphart had are less than one billion the feelings of hurt, and betrayal and injustice felt by Petitioner and his family.

Petitioner is not afraid and will fully, publically and aggressively defend. Petitioner is prepared for an all out war and has been threatened, framed and subject to numerous wrongs as set out fully in Petitioner; Petition for Reinstatement. See said petition to see the hell the Petitioner and his family has been put through. The Supreme Court (which recused itself) Ordering Petitioner to go before the COP who gang raped Petitioner of his rights is an inappropriate response. It's like telling a victim of rape to go see the rapist for assistance. Then paying them for being raped. It is time to finally do the right thing. (Emphasis added).

The solution was obvious. An Order stating that Petitioners Due Process Rights were violated and no license suspension is justified. Now things are way out of control where the creditability of the Montana Supreme Court is now being questioned.

The solution is still simple either the five judge panel assigned this case or Montana Supreme Court issue an Order stating that Petitioner's Due Process rights were violated. The prior Order of suspension is expunged. All prior and current actions associated wit this matter are sealed. The Commission On Practice is to cease and

desist any actions against the Petitioner involving this matter or related to this case. Petitioner believes that he is due an apology for the manor and damage caused the Petitioner and his family. (Emphasis added).

Petitioner wants the file which is not available to the public sealed. Daughter read the Montana Lawyer article and burst into tears as a result of these false ethics charges. As a parent I am more than willing to fight to the end of time to protect my family honor and name. Justice Warner made a brief appearance telling a joke. Then commenting how he is hardly ever wrong and talking about his wife. Justice Warner did not answer questions.

For the record Petitioner will not tolerate any threats or harassment from any member of the Commission On Practice. This includes the chairman Warren. This is as temperate approach as will be filed. Petitioner would never threaten anyone all that is needed is the truth. Petitioner has never threatened anyone. The thought of threatening anyone has never entered Petitioners mind.

CONCLUSION:

Petitioner was denied due process. The Montana Supreme Court or *FIVE JUDGE DISTRICT COURT PANEL* should issue an appropriate order ending this ordeal. (Emphasis strongly added). The parties should get along with their lives. Petitioner's law license is reinstated. The record of Petitioner's suspension is expunged. The records of this matter are sealed. Petitioner shall not be required to take additional

Continuing Legal Education classes for the time period of license suspension. Petitioner is reinstated to the practice of law as of April 2006. No references to any suspension of Petitioner's law license shall be contained in Petitioner's file. Lets put this mess behind us. (Emphasis added).

Petitioner respectfully requests that:

1. The filings be properly filed and forwarded to the Honorable five judge panel that has been assigned this matter.

2. That the Petitioner's 'as License be reinstated on April 5, 2006 for due process violations.

3. That all disciplinary proceedings against Petitioner arising from this matter be ended.

4. That the filed concerning this matter be sealed.

5. That the record show that no suspension of Petitioner's license took place.

Submitted this 28th day of March 2006.

Certificate of mailing
Joseph F. Nascimento, Attorney-Farmed
For reporting case fixing activities
Every district court judge and
COP at their last known address

federal judge along with the
P.O. Box 35613
Las Vegas, NV 89133
Reinstatement Petition
(702) 645-9225

The allegations herein are true to the best of Petitioners knowledge, opinion and belief.

IN THE SUPREME COURT OF MONTANA

Filed
May 09, 2006
Ed Smith
Clerk of Supreme Court
State of Montana

No. 02-778

IN THE MATTER OF)
JOSEPH NASCIMENTO

Order

An Attorney at Law,)

Respondent)

The Commission on Practice of the Supreme Court of the State of Montana filed its Findings of Fact, Conclusions of Law and Recommendations of the Commission on September 23, 2003, in response to which, on December 15, 2003, Respondent filed his "Findings of Fact, Conclusions of Law and Recommendations of the Montana Supreme Court," which, in spite of such denomination, the Court deemed to be Respondent's Objections to the Findings, Conclusions and Recommendations of the Commission. The matter was then deemed submitted to the Court for disposition.

Thereafter, having reviewed the entire record and concluding therefrom that clear and convincing evidence substantiates the Findings, Conclusions and Recommendations of the Commission, the Court entered its final Order as follows:

EXHIBIT 6

1. Respondent was suspended indefinitely from the practice of law in the State of Montana with a minium suspension period of two years, commencing on March 1, 2004, and was thus subjected to the requirements of Rule 23 of Lawyer Disciplinary Enforcement – and was so reminded by the Court.

2. Respondent was ordered to pay the costs of the proceedings, the amount of which to be set in a forthcoming letter from the Secretary of the Commission on Practice, to which Respondent was given ten days after service thereof in which to file written objections, and if so desired, request a hearing before the Commission on whether the amount of such costs are reasonable and necessary. The Commission was thereafter recommended an amount of such costs are reasonable and necessary. The Commission was thereafter recommended an amount of costs to be imposed, and file its recommendations, along with any objections, thereto with the Court, which shall then issue an appropriate order assessing costs. Rule 7 R.L.D.E.

The Commission filed its Statement of Costs on January 22, 2004, and its Amended Statement of Costs on January 29, 2004, to which Respondent filed a number of documents on response and objection, including a " Motion for Reconsideration." A Motion to Reassign the Case" and, on February 9, 2004 document entitled "Opposition to Amended Costs." Respondent did not request a hearing.

On February 10, 2004, the Court, having duly considered the merits of same, entered its Order Denying Respondent's Motions for Reconsideration and to reassign the case. The Court further Ordered the Commission to file its recommendation of costs to be imposed pursuant to Rule 7 R. L.D. E.

On May 17, 2004, Respondent filed document titled "Allegations Respondent Attorney Nascimento was Framed for Reporting Acts of Public Corruption – Allegations of case Fixing Activities – Allegations (sic) of Respondent's Constitutional Rights and Civil Rights."

Also on that date Respondent submitted to the Clerk of the Court a copy of a complaint that he had filed in the United States District Court for the District of Nevada against Montana Supreme Court Justices Cotter, Leaphart, Nelson, Regnier, and Rice and also the Supreme Court Clerk Ed Smith. Special Counsel for the Commission responded that no new issues were raised in the "Allegations" which have not previously been briefed by him and considered by the Court when it entered its January 21, 2004 sanction Order, Special Counsel thus requested that the Court conclude that the decision of the Court to impose sanctions upon him is a final non-appealable Order.

However, on June 21, 2004, the same day the Commission filed its Findings, Conclusions and Recommendations regarding costs, the Court, the Court entered an Order concluding that it would be

inappropriate for members thereof to participate in any further proceedings herein due to the federal lawsuit. Respondent has filed against five of the justices thereof. Consequently, the Court ordered that the "Allegations" be taken under advisement pending appointment of five District Judges to consider them and Special Counsel's Response thereto.

Thereby, Order entered July 1, 2004, District Judges Ted O. Lympus, Stewart E. Stadler, James A. Hayes, Michael C. Prezeau and Kurt Kruger were appointed to sit respectfully, for Chief Justice Karla Grey and Justices Jim Rice, W. William Leaphart, James C. Nelson, and Jim Regnier and in such capacity to consider and enter an Order addressing such "Allegations" of Respondent, Special Counsel's Response thereto and the Commission's Findings of Fact, Conclusions of Law and Recommendations regarding costs.

First having read and considered the various "Allegations" filed by the Respondent with the Clerk of this Court on May 17, 2004, and Special Counsel's Response thereto, together with various additional "Allegations" subsequently so filed, the Court finds no new issues which were previously raised and fully briefed by Respondent and duly considered by the Court upon entry of its Order of January 21, 2004, wherein by clear and convincing evidence the Court concluded that the Findings of Fact, Conclusions of Law and Recommendations of the Commission were

substantiated in their entirety and, accordingly, the sanctions therein recommended and above noted were and above noted were imposed upon Respondent.

The constitutional and statutory procedures for consideration of the Complaint against the Respondent have been fulfilled and exhausted and he has provided no new grounds for reconsideration of same by the Court, nor is there any basis whatsoever either in law or fact for Respondent's request that a seven judge panel rehear this matter.

Based upon the foregoing the Court concludes that Respondent has, without exception been afforded his rights to due process herein and the decision of this Court to impose sanctions so imposed is a final non-appealable Order of this Court and, therefore, no further filings from Respondent with respect thereto should be accepted by the Clerk of this Court.

Finally addressing the issue of assessment of costs and as above noted, in the Court's Order of January 21, 2004, the Commission conducted a hearing upon the issue of costs at which Respondent appeared telephonically. Thereafter on June 21, 2004 the Commission made and filed its Findings of Fact, Conclusions of Law and Recommendations, together with Exhibit A thereto consisting of documentation of costs so incurred, wherein the Commissioners unanimously recommended that Respondents objections thereto be dismissed and that costs

In the sum of $2,809.94 be assessed by the Commission, which include no reimbursement for the services of Special Counsel, are fully documented and reasonable. Based upon the foregoing:
IT IS HEREBY ORDERED:

1. Respondent has been accorded due process throughout the proceedings against him. His Allegations and subsequent pleadings are simply restatements of the allegations he has previously made and which have been considered and rejected by the Commission and this Court. There is no legal basis for granting relief that Respondent now seeks.

2. The decision of this Court to impose sanctions so imposed upon the Respondent by its Order of January 21, 2004, constitutes a final, non-appealable Order and, therefore, no further filings from Respondent with respect thereto shall be accepted by the Clerk of this Court.

3. Costs herein in the sum of $2,809.94 are assessed against Respondent and he shall pay such sum to the Clerk of the Court within 20 days hereof.

4. The Clerk of this Court shall serve a copy of this Order upon Respondent Joseph Nascimento by certified mai, return receipt and shall mail copies hereof by ordinary mail to Special Counsel Stanley T. Kaleczyc and to the Chairman and Secretary of the Commission on Practice.

DATED this 8 th Day of April, 2006.

Ted O. Lympus
Stewart E. Stadler
Signature unreadable
Signature unreadable
Signature unreadable

Attest a true copy
By Rex Renk, Deputy
Ed Smith
Clerk Montana Supreme Court
State of Montana

Footnote – The above date of April 8 th 2006 was crossed out by pen and a hand written date of May 8, 2006 was written into this Order. The date change contains no initials as to who, why, such a date change was made. For the record Chief Justice Grey recused herself see Appendix pg.7 . Petitioner alleges that he did in fact request a hearing. The Commission keeps no official case register or docket sheet. Special Counsel did not respond to each of Petitioners filings. Petitioner informs his attorney that records were falsified and evidence fabricated to frame him and deny him his constitutional rights. A de novo review should address all issues raised factually and legally. The allegations and information contained in this writ are made after consulting with the Petitioner and are true to the best of our knowledge, opinion and belief.

Supreme Court, U.S.
FILED
MAY 25 2007
OFFICE OF THE CLERK

(2)

Nº. 06-1259

In The
Supreme Court Of The United States

OCTOBER TERM 2006

APPEAL FROM THE MONTANA SUPREME COURT

JOSEPH F. NASCIMENTO,
PETITIONER,

V.

MONTANA SUPREME COURT, et al,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORRI
TO THE MONTANA SUPREME COURT

PETITION FOR REHEARING

Counsel:

Kevin E. Vainio, Esq.
27 West Park Street
Butte, Montana 59701
(406) 782-3357
Attorney for Petitioner

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II. THE PROCEDURES OF THE COMMISSION ON PRACTICE EXPOSED PETITIONER TO A SUBSTANTIAL RISK OF VIOLATION OF DUE PROCESS AND VIOLATED HIS DUE PROCESS RIGHTS TO SUCH AN EXTREME THAT A WRIT OF CERTIORARI SHOULD BE GRANTED.

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B. DUE PROCESS WAS VIOLATED BECAUSE SOME COMMISSION MEMBERS WHO FOUND THAT PETITIONER HAD VIOLATED HIS ETHICAL RESPONSIBILITIES ALSO PARTICIPATED IN MAKING THE PROBABLE CAUSE DECISION WHICH LED TO FILING OF THE FORMAL COMPLAINT.

C. THE PROCEEDINGS BEFORE THE COMMISSION WERE VIOLATIVE OF DUE PROCESS AS SOME COMMISSION MEMBERS AS WELL AS THE SPECIAL COUNSEL WHO PROSECUTED PETITIONER HAD PECUNIARY AND OTHER IMPROPER INTERESTS IN THE OUTCOME .

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PETITION FOR REHEARING

Petitioner/Appellant Joseph F. Nascimento, pursuant to Supreme Court Rule 42 paragraph 2, presents his Petition for Rehearing of the order dated April 30, 2007 denying his Petition for a Writ of Certiorari in the above-entitled cause, and, in support thereof, respectfully shows:

INTRODUCTION

This is an attorney discipline proceeding brought against Petitioner Joseph F. Nascimento before the Montana Commission on Practice (MCOP) and the Montana Supreme Court. Petitioner sought child support and medical insurance coverage for his daughter from his ex-wife. Montana First Judicial District Court Judge Dorothy McCarter presided over the action.

Petitioner became concerned over several developments in the case. Petitioner filed an appeal to the Montana Supreme Court. In one of his submissions he made certain statements concerning Judge McCarter's handling of the case. Based on Petitioner's statements, Judge McCarter filed an ethics complaint against him with the MCOP.

It is not the purpose of this Petition to litigate the truth of Petitioner's statements concerning Judge McCarter. Suffice it to say that there is already evidence in the record supporting the reasonableness of Petitioner's belief in the truth of many of his statements. There is more evidence which can be offered if Petitioner is allowed to do so in a fair proceeding before an impartial tribunal. Petitioner appeals to this Court to afford him that due process.

The American Bar Association (ABA) made a study of the procedures under Montana's 1983 Rules of Lawyer Disciplinary Enforcement (*RLDE 1983*). *ABA, Report on the Montana Lawyer Regulation System* (Nov. 1993) (*ABA Report*). This report concluded that "the current system creates the appearance of unfairness." Almost a decade later, the Montana Supreme Court chose to implement new Rules of Lawyer Disciplinary Enforcement. (*RLDE 2002*). These rules became effective on July 1, 2002 and incorporated many of the recommendations contained in the *ABA Report*. To remedy the "appearance of unfairness" noted, an independent Disciplinary Counsel as well as review panels composed of Commission on Practice members who initially review complaints, but are not involved with the case thereafter, were established. Rules 1, 3 and 5 (*RLDE 2002*).

Petitioner was not afforded these protections. As the informal complaint against Petitioner was filed before July 1, 2002, the *RLDE 1983*, determined by the ABA to appear to be unfair, would apply. All the feared risks of bias and unfairness identified in the *RLDE 1983* by the *ABA Report* became realities in Petitioner's case.

In this motion, Petitioner asks the Court to reconsider the prior denial of a Writ of Certiorari, to thereafter grant the Writ and determine:

1. The extent to which combination of adjudicatory, prosecutorial and investigative functions in lawyer disciplinary tribunals is permissible under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and
2. Whether, under the facts of Petitioner's case, the Due Process Clause of the Fourteenth Amendment was violated.

GROUNDS FOR REHEARING

I. THIS CASE PROVIDES AN OPPORTUNITY FOR RESOLUTION OF UNCERTAINTY AND CONFLICT AMONG THE STATES AS TO WHAT DUE PROCESS RIGHTS ATTACH TO ATTORNEY DISCIPLINE PROCEEDINGS.

This case is a clear opportunity to settle uncertainty and conflict among the highest state courts as to the applicability in attorney discipline proceedings of **Withrow v. Larkin**, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct 1456 (1975) which permitted the combination of adjudicatory, investigative and prosecutorial functions in administrative agencies. **Withrow** held, in part, that, without more, due process is not violated when an administrative board receives the results of an investigation, approves the filing of charges based on the investigation and then subsequently adjudicates those charges.

Cases which have cited **Withrow** as permitting the combination of investigatory functions with adjudicatory functions in attorney disciplinary poceedings include **Goldstein v. Commission on Practice**, 2000 MT 8, 297 Mont. 493, 995 P.2d 923, cert. den. sub nom. **Albers v. Supreme Court**, 531 U.S. 918, 121 S.Ct. 276, 148 L.Ed.2d 201 (2000); **In re Davis**, 682 P.2d 38, 40 (Ariz. 1981) and **People v. Varallo**, 913 P.2d 1, 4-5 (Colo. 1996). To the contrary, it has been held in **Tweedy v. Oklahoma Bar Ass'n**, 624 P.2d 1049, 1053 (Okla. 1981) that due process was violated by the Oklahoma disciplinary procedures because "[c]oncentrating

the powers of judge and prosecutor in the same person or body poses an unreasonably high risk of compromising the protected and cherished value of judicial detachment and neutrality." See also, **In re Schlesinger**, 172 A.2d 835 (Pa. 1961) citing **In re Murchison**, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) in holding that the combinations of the functions of prosecutor, judge and jury in an attorney disciplinary proceeding violated due process.

Petitioner maintains that this portion of **Withrow** is inapplicable to attorney discipline tribunals. Administrative agencies such as those in **Withrow** are not part of the judicial branch of government. In **Razatos v. Colorado Supreme Court**, 756 F.2d 1429, 1435 (10th Cir. 1984) it was held that attorney disciplinary proceedings were "definitely judicial rather than administrative in nature." MCOP has, been classified as "an arm of" the Montana Supreme Court. **Goldstein**, supra, 2000 MT 8 at ¶76 (J. Nelson dissenting). As such, the protections of due process inherent in courts, as opposed to those in agencies, should apply.

As attorney disciplinary tribunals are deemed a part of the judicial system, courts tend to accord their recommendations the weight of judicial determinations, although many of the due process rights are not available. This is so even after the reviewing court has retained the right of review. In **Goldstein**, supra, 2000 MT 8 at ¶¶ 112 – 120, Justice Nelson discussed the impact of *de novo* review together with the history of disciplinary actions in Montana and stated, at ¶113, that: "The protections afforded by this review are illusory, however, and exacerbate, rather than alleviate the prejudice inherent in Montana's disciplinary system." Justice Trieweiler admitted that he lacked the time to review the record in every MCOP proceeding, did not have the ability to evaluate the credibility of conflicting witnesses and that review "should be of no meaningful comfort to those attorneys who suspect the disciplinary process because of its current structure." **Goldstein**, supra, 2000 MT 8 at ¶128.

Petitioner raised many issues before the MCOP, but none of those issues were considered. The Montana Supreme Court, sitting in review, followed suit and also failed to address these issues. This is evident from the Order of the Montana Supreme Court which is included in the Appendix to this Motion. An interesting comment on page 1 of that Order is the Montana Supreme Court's reference to a Brief filed by "[t]he Commission on Practice" This Brief was

actually filed by the special counsel Kalekczyk. By this reference the Montana Supreme Court apparently conceded that MCOP and the prosecuting special counsel are all part of the same entity.

The conflict over this issue is deep, mature and in need of resolution by this Court.

II. THE PROCEDURES OF THE COMMISSION ON PRACTICE EXPOSED PETITIONER TO A SUBSTANTIAL RISK OF VIOLATION OF DUE PROCESS AND HIS DUE PROCESS RIGHTS WERE VIOLATED TO SUCH AN EXTREME THAT A WRIT OF CERTIORARI SHOULD BE GRANTED.

Even if combining the adjudicatory, investigative and prosecutorial functions in an attorney disciplinary tribunal is not deemed to be a per se violation of due process, special facts and circumstances may render the combination of such roles in an agency impermissible under the Due Process Clause. **Withrow v. Larkin**, 421 U.S. 35, 51 – 58, 95 S.Ct. at 1466-70, 43 L.Ed.2d at 726-29 (1975). Further, in **Withrow** this Court stated that one class of cases "which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable" are those cases where "the adjudicator has a pecuniary interest in the outcome ...." 421 U.S. 35 at 47. (Citing **Gibson v. Berryhill**, 411 U.S. 564 (1973); **Ward v. Village of Monroeville**, 409 U.S. 57 (1972); **Tumey v. Ohio**, 273 U.S. 510 (1927); **Commonwealth Coatings Corp. v. Continental Casualty Co.**, 393 U.S. 145 (1968)).

The procedures under *RLDE 1983* were determined to "create the appearance of unfairness" in the *ABA Report*. As shown below, facts and circumstances of this case can only lead to the conclusions that the procedures employed created a high risk of unfairness, which risk were realized, and that Petitioner was denied his due process right to an impartial tribunal and fair trial.

A. ALTHOUGH UNDER THE *RLDE 1983*, THE MCOP WAS COMPOSED OF A MAXIMUM OF ELEVEN MEMBERS, TWELVE COMMISSION MEMBERS PARTICIPATED IN MAKING THE DECISION ON THE MERITS.

Rule 1 of the *RLDE 1983* provided in relevant part that: "The Court shall appoint an eleven member commission . . . which shall consist of eight practicing lawyers . . . and three nonlawyers."

Rule 2 of the *RLDE 2002* provides in relevant part: "The Court shall appoint a fourteen – member commission . . . which shall consist of nine practicing lawyers . . . and five non-lawyers." Although the *RLDE 1983* was supposed to apply to Petitioner's case, twelve members of the *RLDE 2002* commission actually participated in the hearing and decision. The newer panel formula was weighted more favorably toward non-lawyers. This failure to adhere to the relevant rules regarding panel composition meant that the MCOP was without jurisdiction. Its actions were void, a nullity from their inception, and constituted a violation of due process.

B. DUE PROCESS WAS VIOLATED BECAUSE SOME COMMISSION MEMBERS WHO FOUND THAT PETITIONER HAD VIOLATED HIS ETHICAL RESPONSIBILITIES ALSO PARTICIPATED IN MAKING THE PROBABLE CAUSE DECISION WHICH LED TO FILING OF THE FORMAL COMPLAINT.

At some undetermined time in early 2002 some of the Commission members were required to have met and made what was, in essence, a probable cause determination pursuant to Rule 9A *RLDE 1983.* Under Rule 1C *RLDE 1983* a quorum was six members. The date and number of members who participated is unknown because Petitioner was denied discovery. Assuming a quorum met, at least four of the twelve members of the MCOP who made the decisions at the May 15, 2002 hearing on the merits also participated in the probable cause determination.

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1969) held that due process requires any person or persons who were involved in making a preliminary decision directed at the rights of any person refrain from later participating in the final decision concerning those rights which is under review by a court.

It can be argued the MCOP's decisions are not final because its determinations are subject to *de novo* review by the Montana Supreme Court. This is not accurate. Under Rule 9B *RLDE 1983* the MCOP is permitted to give "a private admonition to the respondent in the name of the Supreme Court ...." Such private admonitions "are not appealable". The argument also loses its force in light of the revelations by Justices Nelson and Trieweiler concerning *de novo* review in **Goldstein v. Commission on Practice**, 2000 MT 8, 297 Mont. 493, 995 P.2d 923, cert. denied sub nom. **Albers v. Supreme**

Court, 531 U.S. 918, 121 S. Ct. 276, 148 L.Ed.2d 201 (2000) which have been previously discussed. With very few exceptions the Montana Supreme Court adopts the findings, conclusions and recommendations of the MCOP. For all practical purposes the MCOP's determinations are the "final decisions". The fact that neither the Supreme Court, nor the five judge district court panel appointed to reconsider the Supreme Court's Order addressed any of Petitioner's objections further supports the conclusion that review of the MCOP's determinations was, at best, perfunctory.

For this reason, due process was violated and the proceedings below should be nullified.

C. THE PROCEEDINGS BEFORE THE COMMISSION WERE VIOLATIVE OF DUE PROCESS AS SOME COMMISSION MEMBERS AS WELL AS THE SPECIAL COUNSELS WHO PROSECUTED PETITIONER HAD PECUNIARY AND OTHER IMPROPER INTERESTS IN THE OUTCOME .

Petitioner found himself in his predicament because of statements he made indicating serious unethical and criminal activities by Judge Dorothy McCarter one of three judges in the Montana First Judicial District located in the Montana capitol. The initial complaint to the MCOP was made by Judge McCarter. It was evident from the start that the case would turn on the credibility assessments of Petitioner and Judge McCarter. Judge McCarter, as well as Petitioner, had much to gain or lose in the outcome.

Additionally, at least two members of the MCOP who participated in the proceeding, Vice Chairman Gary Davis and MCOP member Michael Lamb, are both Helena attorneys who personally, along with members of their firms, have practiced law for many years and continue to practice law before Judge McCarter. The initial special counsel appointed by the MCOP to investigate and prosecute Petitioner, David Dalthorp, as well as his successor, Stanley Kaleczyk, were members of prominent Helena firms who personally, along with members of their firms, also practice frequently before Judge McCarter.

Further evidence of the close relationship between Judge McCarter and Vice Chairman Davis is the fact that Judge McCarter's husband, Mike McCarter, a Helena attorney for many years and the former Worker's Compensation Judge for the State of Montana, within the last year and a half, took a position with Luxan &

Muffitt, a law firm in which Gary Davis is a principal owner. Also, the daughter of special counsel Stanley Kaleczyk, Jennifer Collins Kaleczyk, who became licensed to practice law in 2002, recently took a position with Luxan & Murfitt.

With this background, and considering psychological tendencies and human weaknesses, MCOP members Davis and Lamb and special counsels Dalthorp and Kalecczyk obviously would benefit from currying favor from, and not displeasing, Judge McCarter. All these individuals had the duty to disqualify themselves from participation in these proceedings.

As to the MCOP members, even without a showing of actual bias, a decisionmaker should be deemed disqualified "where 'experience teaches that the probability of actual bias on the part of . . . the decisionmaker is too high to be constitutionally tolerable.'" **Withrow v. Larkin**, 421 U.S. 35,46, 43 L.Ed.2d 712, 723, 95 S.Ct 1456, 1464 (1975). As previously discussed, the **Withrow** decision states that where the adjudicator has a pecuniary interest in the outcome there has consistently been determined to be a violation of due process. 421 U.S. 35 at 47. However, actual bias was in fact exhibited by these adjudicators. Neither of these MCOP members should have allowed either Dalthorp or Kaleczyk to be appointed as special prosecutors. Davis should not have received ex parte communications from Kaleczyk seeking assistance in drafting the complaint against Petitioner (Exhibit 3 in the Appendix to the Petition for Writ of Certiorari) without informing Petitioner of such communication. Both Davis and Lamb should not have participated in the vote to find Petitioner guilty of ethical violations immediately after the May 16, 2003 hearing, despite Petitioner being assured that he would have thirty days to file proposed findings and conclusions before the case was submitted to the MCOP for determination. The administration of justice requires a fair and impartial tribunal and, when the process is tainted by conduct such as currying favor with a judge before whom the lawyer is likely to appear or has a pending case, the fairness and impartiality of the tribunal is compromised and due process in the administration of justice is prejudiced. See, **In re Powell**, 126 Ill.2d 15, 533 N.E.2d 831 (1988).

As to the investigators and special counsels, Dalthorp and Kaleczyk, in **Young v. United States**, 481 U.S. 787 (1987) it was held that private attorneys appointed to prosecute criminal contempt proceedings must be disinterested the same as public prosecutors.

This requirement of disinterest is so important that "The harmless error doctrine cannot apply since such an error is so fundamental and pervasive that it requires reversal without regard to the facts and circumstances of the particular case." 481 U.S. 787, 809 – 810. Petitioner requests this Court to extend this ruling to private attorneys appointed as prosecutors or special counsel in attorney disciplinary proceedings. Both Dalthorp and Kaleczyk had at least the appearance of a conflict involving potential pecuniary gain, given the fact that they personally, as well as members of their firms, practiced extensively before Judge McCarter. Kalekczyk's daughter, as well as Judge McCarter's husband, became associated with Gary Davis' law firm. There was no proper reason why Dalthorp and Kaleczyk, rather than counsel outside the First Judicial District who did not regularly practice before Judge McCarter, were appointed as investigators and special counsels. Their appointment can be explained by a desire of members on the MCOP to guarantee biased prosecutors with a close allegiance to the interests of Judge McCarter. Actual harm in the form of prejudicial treatment by Dalthorp and Kaleczyk is present. Dalthorp testified at the hearing that he had destroyed his investigative notes which Petitioner had sought through discovery and was denied. The opportunity to obtain any exculpatory material which may have been contained in Dalthorp's notes was denied to Petitoner by Dalthorp's actions. As to his successor, Kaleczyk, his prejudicial actions included, but were not limited to, sending ex parte communications to MCOP Vice Chairman Davis as well as the secretary to the MCOP seeking their input as to the formal Complaint against Petitioner (Exhibits 3 and 4 in the Appendix to the Petition for Writ of Certiorari which Petitioner obtained by happenstance), opposing all forms of discovery requested by Petitioner and either being present when or being otherwise aware that the MCOP unlawfully voted to find Petitioner guilty of ethics violations prior to submission of the matter through filing of proposed findings of fact and conclusions of law. This latter fact is corroborated by the fact that Kaleczyk did not submit proposed findings and conclusions, although MCOP Chairman Warren had ordered simultaneous filings within thirty days. As an attorney, Kaleczyk had an ethical obligation to call this flagrant error to the attention of the MCOP.

The appearance of bias, pecuniary and other improper interest and conduct of MCOP Vice Chairman Davis and member Lamb precludes the MCOP from being considered an impartial

tribunal. The appearance of improper interest in the outcome and prejudicial conduct by the investigators and special counsels Dalthorp and Kaleczyk rendered them improper persons to serve in those capacities. Fundamental due process was denied to Petitioner.

D. THE DUE PROCESS RIGHT TO AN IMPARTIAL TRIBUNAL WAS VIOLATED WHEN, IMMEDIATELY AFTER PETITIONER WAS INFORMED HE HAD THIRTY DAYS TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND HE HAD LEFT THE BUILDING, THE COMMISSION VOTED TO FIND PETITIONER GUILTY OF PROFESSIONAL MISCONDUCT.

"'Ay,' replied the Preceptor, 'trial moves rapidly on when the judge has determined the sentence beforehand.'" Sir Walter Scott, Ivanhoe, Chapter 36.

At both the beginning and end of the hearing on the merits on May 15, 2003, MCOP Chairman John Warren, with all participating MCOP panel members present, advised Petitioner of his right to present proposed findings and conclusions within thirty days of the hearing, and that sometime after that time the MCOP would reach its decision. Petitioner agreed to submit his proposed findings and conclusions within thirty days of the hearing. Chairman Warren ordered "simultaneous findings in 30 days." However, after the MCOP members were assured that Petitioner had left the building, the MCOP members immediately voted to find Petitioner guilty of the ethics violations charged in the Complaint. Special Counsel Kaleczyk was either present when the MCOP took this vote or learned of the vote after the hearing. Although Petitioner filed his proposed findings and conclusions within thirty days, Kaleczyk did not file any proposed findings of fact and conclusions of law. It was only during a transcribed telephone hearing concerning the assessment of costs held after the Montana Supreme Court conducted its pro forma review of the MCOP's determination and had entered its Order suspending Petitioner from the practice of law for an indefinite period of at least two years that Petitioner discovered these facts. Chairman Warren admitted during that hearing, with all but one panel member present, that: "[T]he Commission deliberated after the hearing. There was no other hearing." Although this fact was brought to the attention of the five district judges who were appointed to hear Petitioner's request for reconsideration, this panel

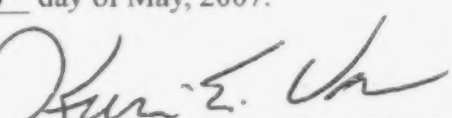
in its May 9, 2006 order, did not even address this issue. The review by this panel of judges was pro forma at best, and judicial review at its worst.

In the context of lawyer discipline proceedings the Fourteenth Amendment Due Process Clause requires fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense. **In re Ruffalo**, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222, *reh. denied* 391 U.S. 961 (1968). In criminal proceedings this Court has held that even in non-jury trials: "'The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right.' " **Herring v. New York**, 422 U.S. 853, 860 (1975). (Quoting with approval **Yopps v. State**, 228 Md. 204, 207, 178 A.2d 879, 881 (1962)). Petitioner asks the Court to hold that due process also encompasses the right of a self-represented attorney in a disciplinary proceeding to present his final arguments of the facts and law in written form prior to a determination as part of the due process meaningful opportunity for explanation and defense. This should especially be true where such attorney was told by the adjudicator that he would have such a right.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue.

DATED this 25th day of May, 2007.



Kevin E. Vainio, Attorney for Petitioner/Appellant
27 West Park Street
Butte, Montana 59701
Telephone: (406) 782-3357
Fax: (406) 782-2359

CERTIFICATE OF COUNSEL

I, Kevin E. Vainio, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 44, subdivision 2, of the Rules of this Court.

DATED this 25th day of May, 2007.

Kevin E. Vainio, Attorney for Petitioner/ Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2007 I served the foregoing upon opposing counsel by depositing (3) three true and correct copies thereof in the United States mail, postage prepaid, addressed as follows:

Christian D. Tweeten
Montana Attorney General's Office
P.O. Box 201401
Helena, Montana 59620-1401

Kevin E. Vainio, Attorney for Petitioner/Appellant

APPENDIX

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 02-778

IN THE MATTER OF
JOSEPH NASCIMENTO,

An Attorney at Law,

Respondent.

The Commission on Practice of the Supreme Court of the State of Montana filed its Findings of Fact, Conclusions of Law, and Recommendations of the Commission in this matter on September 23, 2003. After some delay by virtue of a request for transcript and the filing of a motion to dismiss, this Court directed Nascimento to file his objections to the Findings and Conclusions of the Commission on or before Friday, December 12, 2003. (Order dated October 28, 2003). On December 15, 2003, Nascimento filed his "Findings of Fact and Conclusions of Law and Recommendation of the Montana Supreme Court." In his filing, consisting of thirty-six pages of narrative together with twenty exhibits, Nascimento denies having violated the Montana Rules of Professional Conduct. Moreover, he continues to allege that the Honorable Dorothy McCarter, Lewis and Clark County District Court, has destroyed evidence and court documents, and that she has "fixed" an ethics complaint against his ex-wife's attorney and received "kick-backs" from Nascimento's ex-wife in exchange for ruling in her favor in the divorce action. He further charges that Judge McCarter and others whom he believes have conspired with her, should be criminally prosecuted. The other allegations in Nascimento's Findings and Conclusions are too numerous to mention and are not relevant to the proceedings before this Court.

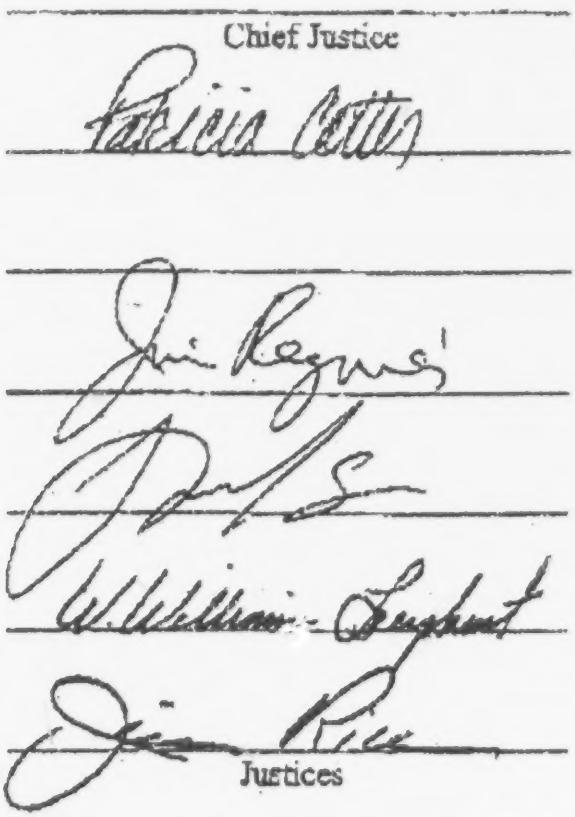
The Commission on Practice has filed a brief in reply to Nascimento's Findings of Fact and Conclusion of Law, and has also filed a Motion to Strike Exhibits.

The Secretary of the Commission on Practice. The Clerk is further ordered to mail copies of this Order to the District Courts of the State of Montana, to the Clerk of the Federal District Court of the District of Montana, to the Clerk of the Circuit Court of Appeals of the Ninth Circuit, and to the Executive Director of the State Bar

of Montana.

DATED this 20th day of January, 2004.

Signatures



CHEIF JUSTICE KARLA M GRAY AND JUSTICE JOHN WARNER DID NOT PARTICIPATE IN THIS MATTER.